No. 85-2091

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1985

UNION OIL COMPANY OF CALIFORNIA,

Petitioner,

vs.

PAT J. BUCHANAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA SUPREME COURT

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QUESTIONS PRESENTED

1. May a state tort claim be maintained where the allegations therein are inextricably intertwined with a collective bargaining agreement such that in adjudicating the complaint the trial court will necessarily be required to interpret and apply a collective bargaining agreement containing a mandatory arbitration clause?

2. Is an employee excused from exhausting her contractual remedies under an exclusive and mandatory arbitration clause where she has made no demonstration that the initiation of formal grievance procedures would be futile? [1]

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[1] Petitioner Union Oil Company of California is a California corporation and a wholly owned subsidiary of Unocal Corporation, a Delaware corporation, and affiliated with the following companies: Molycorp, Inc.; Poco Graphite, Inc.; Unocal Pipeline Company; Puritan Agency Incorporated of Illinois; Westcoast Shipping Company; PureGro Company; and Arizona Refining Company. All subsidiaries of Union Oil Company of California are wholly owned.

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Petitioner, Union Oil Company of California (hereinafter referred to as "Union Oil") respectfully prays that a writ of certiorari issue to review a decision of the California Supreme Court entered on March 27, 1986.

CITATION TO OPINIONS BELOW

The decision of the United States District Court, Central District of California appears in *Appendix "A"*. The decision of the California Superior Court, County of Orange, ruling on Union Oil's motion for summary adjudication of issues appears in *Appendix "B"*. The decision of the California District Court of Appeal denying Union Oil's petition for writ of mandate appears in *Appendix "C"*. The decision of the California Supreme Court denying Union Oil's petition for review appears in *Appendix "D"*.

JURISDICTION

The decision of the California District Court of Appeal was issued on January 16, 1986. A petition for review to the California Supreme Court was denied on March 27, 1986. This Petition for Writ of Certiorari was filed within 90 days of that date as provided under 28 U.S.C. § 2101(c), and this Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

Section 301 of the Labor-Management Relations Act (29 U.S.C. § 185) provides in relevant part as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in

controversy or without regard to the citizenship of the parties.

The only constitutional provision implicated is the Supremacy Clause (Art. VI, cl. 2).

STATEMENT OF THE CASE

Contrary to the unanimous view of the federal courts, California permits a state tort claim to be maintained though each of the allegations upon which the Complaint is premised is arguably a breach of a collective bargaining agreement and though the plaintiff has failed to pursue her arbitral remedies. This Court recently considered the extent to which an analogous state claim is preempted where the tort allegations are founded on the breach of a collective bargaining agreement and are "inextricably intertwined" with rights and obligations established by the contract. *Allis-Chalmers Corp. v. Lueck,* 471 U.S....., 85 L.Ed.2d 206, 105 S. Ct. 1904 (1985).

A. The Facts.

Union Oil, through its Oil and Gas Division, extracts oil and gas from various onshore and offshore properties. Respondent, Pat J. Buchanan ("Buchanan"), was employed as a field operator assigned to an offshore drilling platform and was covered by a collective bargaining agreement ("Agreement") negotiated on her behalf by the International Union of Petroleum and Industrial Workers, SIUNA, AFL-CIO, ("IUPIW"). This Agreement contained provisions governing, overtime assignments, leaves of absence, sick leave, compensation, work assignment, and all other conditions governing the terms of Buchanan's employment with Union Oil. Any alleged violation of these contractual provisions was subject to a mandatory grievance and arbitration clause.

Eight months after Buchanan was involuntarily terminated from employment with Union Oil because of

her failure to return to work following the expiration of a leave of absence, Buchanan filed her original Complaint in the California Superior Court of the State of California, County of Orange, alleging multiple causes of action against Union Oil, the IUPIW, three supervisors employed by Union Oil and three of her co-workers.

As more fully set forth below, the only causes of action now remaining against Union Oil are (1) intentional infliction of mental distress and, (2) sex discrimination under the California Fair Employment Practices Act. It is only the mental distress claim which is the subject of this petition.

Each of the allegations upon which Buchanan relies in support of her state tort claim for intentional infliction of mental distress is potentially a breach of the Agreement. In this regard, Buchanan's Amended Complaint alleges in pertinent part:[1]

"Defendants, and each of them, singled out plaintiff and treated her in a manner unlike any other employees (sic), subjecting plaintiff to a constant and daily series of acts perpetrated by UNION OIL supervisory personnel and Plaintiff's fellow employees at UNION OIL, including, but not limited to:

> (a) Acts and conduct of supervisory personnel: Unequal treatment of plaintiff in: granting of overtime, as to leaves of absence, as to compensation for college courses, as to medical absences and sick leave, refusing to allow plaintiff to bring school books on board the platform, assigning plaintiff to clerical work."

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[1] Buchanan filed an Amended Complaint on August 24, 1983. The allegations set forth therein are identical to the allegations set forth in her original Complaint with respect to her cause of action for intentional infliction of mental distress.

"On or about July 16, 1982, and while Plaintiff was on medical disability leave, plaintiff was terminated from her employment by defendant, Union Oil."

Notwithstanding the contractual basis underlying each of these allegations, Buchanan never filed a grievance against Union Oil. During a portion of her employment at Union Oil, Buchanan was a union steward and was generally familiar with the provisions of the Agreement and the arbitration provisions set forth therein. Buchanan has pointed to no circumstances that would excuse her from the exhaustion of her administrative remedies under the Agreement. Buchanan has *never* asserted in the grievance and arbitration procedures available to her that Union Oil (1) has treated her unequally with respect to overtime assignments, (2) refused to grant her requested leaves of absence, (3) failed to compensate her for college courses she may have taken, (4) refused to grant her medical absences or sick leave, (5) refused to allow her to bring school books on board the offshore platform, or (6) required her to perform clerical work. Yet, each of these matters is covered by the Agreement and any violation thereof is subject to the contractual arbitration procedures contained therein.

B. Proceedings Below.

March 17, 1983, Buchanan filed her original Complaint against the various named Defendants therein in the Superior Court of the State of California, County of Orange, for (1) intentional infliction of mental distress, (2) negligent infliction of mental distress, (3) violation of the California Fair Employment Practices Act (sex discrimination), (4) wrongful interference with business relations, (5) wrongful inducement of breach of contract, (6) breach of oral contract of employment/wrongful discharge, and (7) breach of duty of fair representation.

Union Oil timely removed the action to the United States District Court, Central District of California. The district court denied Union Oil's petition for removal in an order entered June 10, 1983, for reasons not relevant to the issues raised by this petition. The district court, however, did find federal question jurisdiction over Buchanan's first cause of action for intentional infliction of mental distress to the extent that said cause of action stated a claim against Union Oil. In addition, the district court found federal question jurisdiction over Buchanan's cause of action for breach of oral contract of employment/wrongful discharge, which, as the court decided, stated in essence a claim against Union Oil for breach of the Agreement. *Appendix "A".*

Following the district court's remand to the state court, Union Oil demurred to the Complaint. Following a hearing on the demurrer, the court's order, entered July 28, 1983, dismissed Buchanan's Second Cause of Action for negligent infliction of mental distress and allowed Buchanan leave to amend her Complaint.

Buchanan filed her first Amended Complaint August 24, 1983.

On March 23, 1984, the superior court entered a stipulation, jointly filed and agreed to by Union Oil and Buchanan, to voluntarily dismiss from the Complaint, with prejudice, the supervisory employees of Union Oil named as co-defendants in her First Amended Complaint; i.e., Jimmie D. Grimes, Robert L. Harke, and Robert L. Graves.

On August 15, 1985, in response to the Amended Complaint, Union Oil moved the superior court for summary judgment, or, in the alternative, for summary adjudication of issues, to dismiss Buchanan's first cause of action for intentional infliction of mental distress and her fifth cause of action for breach of oral contract/wrongful discharge,

on the basis that said claims were preempted by federal law and that under federal law both causes of action were barred by the applicable federal statute of limitations and that Buchanan had failed to exhaust the administrative remedies available to her under the Agreement as a condition precedent to bringing suit as required under federal law.

The court found no triable issue of fact as to the applicable statute of limitations period nor the fact that Buchanan had failed to exhaust the administrative remedies available to her under the Agreement as a condition precedent to bringing suit. On December 19, 1985, the court granted Union Oil's motion as to the Fifth Cause of Action for wrongful discharge on the basis of federal preemption, but *denied* Union Oil's motion as to the First Cause of Action for intentional infliction of mental distress on the grounds that said cause was not preempted under the holding in *Garibaldi v. Lucky Food Stores, Inc.,* (9th Cir., 1984) 725 F.2d 1367. *Appendix "B".*

On January 13, 1986, Union Oil filed its petition for writ of mandate with the Court of Appeal of the State of California, Fourth Appellate District. On January 16, 1986, the Court of Appeal denied Union Oil's petition for writ of mandate without comment. *Appendix "C".*

On January 27, 1986, Union Oil petitioned the California Supreme Court for a hearing which was denied March 27, 1986, without comment. *Appendix "D".*

C. Finality of Decision.

The California Superior Court's decision on the § 301 preemption issue is the law of this case and final for the purposes of 28 U.S.C. § 1257. It "finally disposed of the federal preemption issue . . ." and the decision is not subject to further state court review. *Belknap, Inc. v. Hale,* 463 U.S. 491, 77 L.Ed.2d 798, 103 S.Ct. 3172n. 5 (1983).

REASONS FOR GRANTING THE WRIT

A. PREEMPTION IS REQUIRED WHERE A TORT ACTION REQUIRES ADJUDICATION OF A COLLECTIVE BARGAINING AGREEMENT

For a quarter of a century, rights created by a collective bargaining agreement have been governed by and enforceable exclusively under federal law, in particular § 301 of the LMRA. *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456 (1957). In conformity with stated congressional policy (29 U.S.C. § 173(d), this Court has established private arbitration, where agreed upon, as the *exclusive* method for adjudicating disputes that arise under a collective bargaining agreement. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965).

The application and interpretation of a collective bargaining agreement are at the core of Buchanan's tort claim. The propriety of Union Oil's actions vis-a-vis Buchanan can only be resolved by reference to the collective bargaining agreement. Did Union Oil treat Buchanan unequally with respect to overtime assignments; did Union Oil refuse to grant Buchanan's requested leaves of absence; did Union Oil fail to compensate Buchanan for college courses she may have taken; did Union Oil refuse to grant Buchanan medical leaves of absence or sick leave; did Union Oil refuse to permit Buchanan to bring school books to her working location; did Union Oil require Buchanan to perform clerical work; did Union Oil have just cause for terminating her employment? The answers to these and similar questions can only be found through analysis and interpretation of the collective bargaining agreement.

Though Buchanan's allegations are indisputably grievances under the Agreement, the superior court concluded that Buchanan's First Cause of Action for infliction of mental distress was not preempted. In reaching this conclusion, the court rejected the contrary result reached by every federal court which has considered the *identical* issue in the *identical* context.

Federal courts have been unanimous in holding that a tort for intentional infliction for emotional distress is preempted where a collective bargaining agreement would necessarily have to be interpreted in adjudicating the tort complaint. *Truex v. Garrett Freight Lines, Inc.*, 784 F.2d 1347 (9th Cir. 1985); *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 311, 1468 (9th Cir. 1984); *Moore v. General Motors Corp.*, 739 F.2d 311 (8th Cir. 1984); *Viestenz v. Fleming Companies, Inc.*, 681 F.2d 699 (10th Cir.), *cert. denied*, __ U.S. __ 103 S.Ct. 303 (1982); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir. 1978), *cert. denied*, 439 U.S. 630; and *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983).

The preemption test was succinctly set forth by the Ninth Circuit in *Beers v. Southern Pacific Transportation Co., supra.*

> Beers argues that his tort claim for intentional infliction of emotional distress falls within this *Farmer-Sears* [430 U.S. 290 (1977) and 436 U.S. 180 (1978)] exception because his claim is not covered by any provision of the collective bargaining agreement, and, thus, because the remedy he seeks; money damages for emotional distress, is not covered by the labor contract or federal labor law, federal preemption is inapplicable. However, as stated in *Sears*, the critical inquiry is whether the controversy (the harassments) was identical to or different from what

could have been, but was not, presented to the NRAB (National Railroad Adjustment Board). Beers' complaints referred to work conditions, disciplinary procedures, representation rights covered by or substantially related to the collective bargaining agreement. These complaints could have been brought before the NRAB. *State adjudication of the intentional emotional distress claim would have called for interpretation and examination of the collective bargaining agreement resulting in state intervention into the area of federal labor law.* (Emphasis added.) 703 F.2d at 429.

Clearly, *Beers* commands the conclusion that Buchanan's cause of action for mental distress is preempted. As in *Beers,* it is impossible to adjudicate Buchanan's cause of action without resort to the collective bargaining agreement to ascertain whether Union Oil's actions were required by or in contravention of that Agreement.

In point of fact, the superior court expressly concedes that Buchanan's Fifth Cause of Action for wrongful discharge is preempted by federal law, yet her discharge from employment was one of the factors alleged as contributing to her mental distress.

The Court recently decided the almost identical issue in *Allis-Chalmers v. Lueck, supra,* holding that the complaint filed by Lueck "should have been dismissed for failure to make use of the grievance procedure established in the collective bargaining agreement or dismissed as preempted by § 301". 85 L.Ed.2d at 221. Federal courts have decided the preemption issue with respect to joint claims for wrongful discharge and emotional distress since *Allis-Chalmers* have found in favor of preemption.

The Fifth Circuit in *Strachan, et al. v. Union Oil, et al.,* 768 F.2d 703 (1985), affirmed summary judgment entered against plaintiffs on the ground that plaintiffs' state tort

claims were preempted by federal law, citing *Allis Chalmers Corp.* Plaintiffs' complaint alleged assault, invasion of privacy, *mental suffering*, false imprisonment and defamation, all stemming from a required company medical examination to determine their fitness for work. *Strachan* was originally filed in state court and later removed to the federal district court. The district court subsequently found that plaintiffs' state law claims were preempted by federal law and dismissed the action. On appeal, the Fifth Circuit found that the labor contract provided an exclusive remedy for plaintiffs' claims and that failure to pursue their contractual remedies thereunder was fatal to their complaint. The action was dismissed in its entirety.

Similar in its facts and issues as those in the present case is *Vantine v. Elkhart Brass Manufacturing Co., Inc.*, 762 F.2d 511 (7th Cir. 1985). Plaintiff, who was covered under a collective bargaining agreement, filed suit in state court alleging *wrongful termination* in retaliation for his filing a Workers' Compensation claim and *wrongful infliction of emotional distress. Neither plaintiff nor the union filed grievances.*

Following removal to the federal district court, summary judgment was granted defendants and later affirmed by the Seventh Circuit Court of Appeals. Citing *Allis-Chalmers Corp.*, the court held that plaintiff's claim for wrongful discharge was preempted by federal law, i.e. federal law was to be applied to the case. 762 F.2d at 517-518. The court found further that plaintiff's emotional distress claims were preempted by the exclusive remedies provided by the state's workers' compensation laws. 762 F.2d at 521-522.

In *Harper v. San Diego Transit Corp.*, 764 F.2d 663 (9th Cir. 1985), plaintiff, who was covered by a collective bargaining agreement, sued his employer in state court

over his discharge from employment. He alleged that the union failed and refused to arbitrate his grievance without just cause. After removal, the federal district court dismissed the action on grounds of preemption, citing *Allis-Chalmers Corp.*, 764 F.2d at 667-669.

In dismissing the defendant's counter-claim, the district court in *Marine Transport Lines v. Intern. Org. of Masters*, 609 F.Supp. 282 (D.C.N.Y. 1985), held that *the fact that the employer's conduct may give rise to a separate tort under state law does not serve to evade preemption of the claim under federal law*:

> To permit the defendant to avoid grievance and arbitration procedures merely by attaching a tort label to an arbitrable contract dispute would, as the Supreme Court recently stated in *Allis-Chalmers Corp. v. Lueck* "eviscerate a central tenant of federal labor contract law". It was precisely the need to maintain the effectiveness of arbitration that prompted the court in *Lueck* to find that a derivative tort claim was preempted by federal law under § 301 where the collective bargaining agreement imposed the same rights and obligations as would the derivative tort. 609 F.Supp at 287.

In *Cavins v. Aetna Life Insurance Co.*, 609 F.Supp. 309 (D.C. Wisc. 1985), the district court made an exhaustive analysis of the holding in *Allis-Chalmers Corp.* Plaintiff's complaint had asserted five state law claims, among which were *intentional infliction of mental distress, breach of contract* and *conspiracy*. In granting defendant's motion for summary judgment as to the entire cause of action against them, the court found the complaint "properly dismissed for failure to make use of the established grievance procedures or as wholly preempted by § 301 of the Labor Management Relations Act". 609 F.Supp. at 313.

Johnson v. Hussman Corporation, 610 F.Supp. 757 (D.C. Mo. 1985) is similar in its facts as *Vantine, supra.*

Plaintiff filed a wrongful discharge action in state court alleging that he was discharged in retaliation for exercising his rights under the state's worker's compensation laws. Following removal to the federal district court, the court granted defendant's motion for summary judgment and to dismiss. The action involved a determination as to whether the plaintiff was properly discharged under the terms of the labor contract. Citing *Allis-Chalmers Corp.*, the court held: "If the state tort law purports to define the meaning of the contract relationship, the law is preempted." 610 F.Supp. at 759.

See also, Aiello v. Apex Marine Corp., 610 F.Supp. 1255, 1260 (D.C. Pa. 1985), citing *Allis-Chalmers Corp.*: "When the resolution of a state law claim depends upon the analysis of the terms of a labor agreement, 'that claim must either be treated as a § 301 claim . . .or dismissed as preempted by federal labor contract law'." Defendant's motion to dismiss, or, alternatively for summary judgment, was granted.

Ironically, the same California Appellate District Court, Fourth District, which denied review of Union Oil's petition later decided a similar case almost identical in its facts and issues as the instant case and found in favor of preemption. *Friday v. Hughes Aircraft Company*, 179 Cal.App.3d 947 (1986). But see, *Alpha Beta, Inc. et al. v. Superior Court,* 180 Cal.App.3d 324 (1986), filed April 25, 1986, a decision of the First Appellate District Court, finding against preemption of employee's emotional distress claims on similar facts. These cases create a conflict between the state district courts on this issue which has yet to be resolved.

B. THE SUPERIOR COURT ERRONEOUSLY APPLIED THE HOLDING IN GARIBALDI V. LUCKY FOOD STORES, INC.

Garibaldi, who was covered by a collective bargaining agreement, filed suit alleging wrongful discharge in state court after receiving an adverse arbitration award under the labor agreement. After removal, the district court granted summary judgment in favor of the employer. The Ninth Circuit reversed, holding that a suit alleging wrongful termination in violation of public policy was not preempted by federal law and, therefore, removal was improper.

The sole issue presented in *Garibaldi* was whether the action had been properly removed. The Ninth Circuit held that even where the state claim has been preempted by federal law, it does not follow that the federal court has jurisdiction because preemption, as a defensive allegation, is not grounds for removal, i.e. the basis for removal must appear on the face of the complaint. 726 F.2d at 1370.

The issue is different in the instant action. Here, the district court has found federal question jurisdiction over Buchanan's mental distress claim based upon the allegations set forth in the Complaint. Buchanan's mental distress claim raises no issue as to the propriety of Union Oil's removal of Buchanan's original Complaint. Further, the superior court found Buchanan's action for breach of contract/wrongful discharge to be preempted.

In *Olquin v. Inspiration Consol. Copper Co., supra*, which was decided *after Garibaldi*, the Ninth Circuit dismissed plaintiff's emotional distress claims finding in favor of preemption because the claim arose out of matters covered by the collective bargaining agreement, i.e. disputes concerning employment or work conditions. 740 F.2d at 1475-1476. *See also, Allis-Chalmers Corp., supra*, and

cases cited herein following the Supreme Court's decision in that case and which were decided after *Garibaldi*.

Garibaldi is inapposite to the instant case. Buchanan presents a different legal question for decision, i.e. whether her mental distress claims are preempted, not whether removal was proper. Also, the underlying facts as reflected in the pleadings are significantly different than in *Garibaldi*, i.e. Buchanan alleges that her mental distress claims stem from her conditions of employment under a collective bargaining agreement. Further, unlike *Garibaldi*, Buchanan has failed to pursue the administrative remedies available to her under the Agreement. *Garibaldi* should not have formed the basis for the denial of Union Oil's motion.

C. EXHAUSTION OF CONTRACTUAL REMEDIES IS REQUIRED

The gravamen of Buchanan's mental distress claims evolves around alleged conditions of her employment. Such complaints as alleged are clearly covered by the language of the Agreement and subject to the grievance procedure set forth therein. Buchanan's claim of mental distress raises questions "of federal contract interpretation whether there was an obligation under this labor contract" and whether Union Oil's conduct breached the contract provisions provided therein, expressed or implied. Such claims are preempted under the holding in *Allis-Chalmers*. 85 L.Ed.2d 206, 218.

Plaintiff must first attempt resolution of her grievances under the provisions of the collective bargaining agreement as a condition precedent to her bringing suit under § 301 of the Labor Management Relations Act, 29 U.S.C. 185(a). *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-653 (1965); *Vaca v. Sipes*, 386 U.S. 171, 184 (1967). *See generally*, Morris, The Developing Labor Law (2nd. Ed. 1983), pgs. 1294-1299.

Similarly, the resolution of Buchanan's complaints will have a serious impact on other Union Oil employees. Whether Union Oil has a right to assign overtime, deny leaves of absence, compensate for college courses, grant medical absences or deny sick leave, permit employees to bring school books to their work location, or determine the work to be assigned, is a matter of continuing and vital interest to thousands of employees working for Union Oil. By focusing on Buchanan alone, the superior court loses sight of the important role arbitration plays in preserving stable labor-management relations. The exhaustion doctrine insures that a disgruntled employee cannot disrupt that relationship without first attempting to resolve any dispute within the framework provided for by the parties.

It is almost obvious to state that the federal courts have uniformly followed *Republic Steel* and required exhaustion prior to permitting an employee to pursue judicial relief. E.g., *Moore v. General Motors Corp.*, 739 F.2d 311, 317; *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1214 (9th Cir. 1980); *Viestenz v. Fleming Companies, supra*, 681 F.2d at 701. The exception created for Buchanan would swallow the exhaustion rule. Since nearly any alleged willful breach of contract can be restated as a tort claim, the whole range of disputes traditionally resolved through arbitration could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule permitting an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness. *Allis-Chalmers*, 85 L.Ed.2d 206, 220-221.

D. CALIFORNIA HAS ESTABLISHED CONFLICTING RULES WHICH UNDERCUTS NATIONAL LABOR POLICY AND DEMANDS REVIEW BY THIS COURT

Conflicting California law among the appellate district courts, *see, Friday v. Hughes Aircraft Company* and *Alpha Beta v. Superior Court, supra*, and the superior court decision in the instant action by its misapplication of the *Garibaldi* case, undermines the nationwide scheme for the administration of management — union affairs and infringes upon an area of federal concern. A central aim of federal labor policy is to ensure industrial peace and stability by establishing a uniform law governing the application and interpretation of collective bargaining agreements. *Teamsters v. Lucas Flour Co.*, 369 U.S. at 103; *see also, Smith v. Evening News Assn.*, 371 U.S. 195, 200-201 (1962). This the California courts fail to do. The critical inquiry is not whether California seeks to enforce a law of general application, but whether by doing so it will infringe on an area of federal concern. *Sears Roebuck & Co. v. Carpenters*, 436 U.S. 180, 197 (1978).

There is nothing to commend in these decisions. California, in essence, establishes its own policy as to when it will honor collective bargaining agreements and, more frequently than not, misinterprets federal labor law when it does so. The superior court and at least one district court of appeal place collective bargaining agreements, their interpretation and administration, in serious jeopardy. "The possibility that individual contract terms might have different meanings under state and federal laws would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters v. Lucas Flour Co., supra*, 369 U.S. at 103. Every principle upon which these decisions rest has been repeatedly and

pointedly rejected by this Court and all other federal courts.

In addition, arbitration's vital role in the resolution of labor disputes will vanish if an employee can so easily circumvent this contractual machinery. It is the exclusivity of arbitration, as well as its efficiency, which makes it so desirable as an alternative to judicial litigation. This decision will have a "crippling effect" on the arbitration provisions of the Agreement as between the parties by sanctioning its circumvention. *Cf. United Steelworkers v. American Mfg. Co.*, 363 U.S. at 566.

CONCLUSION

California has established conflicting rules which would permit an ex-employee to maintain a state tort claim based on grievances which arise under a collective bargaining agreement and which are subject to an exclusive arbitration procedure. Federal law prohibits this intrusion, and Buchanan's cause of action for intentional infliction of mental distress is necessarily preempted. For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

DATED: June 12, 1986

Respectfully submitted,

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Appendix "A"

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PAT J. BUCHANAN,
Plaintiff,

vs.

UNION OIL COMPANY OF CALIFORNIA, *etc., et al.,*

Defendants.

No. CV 83-2735 RMT(Bx)
ORDER DENYING PETITION FOR REMOVAL

Defendants Union Oil Company of California ("Union Oil") and the International Union of Petroleum and Industrial Workers ("IUPIW") have filed a petition for removal. Said petition came before the court for hearing on May 31, 1983. The court has considered the argument of counsel and all pleadings and other documents filed in connection with the instant petition and finds that the petition for removal should properly be denied for the reasons set forth below.

The parties have stipulated that the court possesses federal question jurisdiction over plaintiff's Seventh Cause of Action which states a claim against IUPIW for breach of fair representation. Additionally, the court finds that it possesses federal question jurisdiction over plaintiff's Sixth Cause of Action which, in essence, states a claim against Union Oil for breach of the collective bargaining agreement. However, because the Ninth Circuit does not recognize the concept of pendent party jurisdiction, the court does not possess subject matter jurisdiction over plaintiff's Second and Third Causes of Action. Similarly, the court is without subject matter jurisdiction over plaintiff's First, Fourth and Fifth Causes of Action to the extent that they state a claim against plaintiff's co-employees and supervisor in their individual capacities. Thus, if this court were

to grant removal, said removal would be effective only as to those causes of action (or portions thereof) which state a claim against either Union Oil or IUPIW. The court would be required to remand to state court all those causes of action (or portions thereof) which state a claim against plaintiff's co-employees and/or supervisor in their individual capacities.

Assuming that a severance of claims would be permissible under 28 U.S.C. § 1441 and that the court were to remove those causes of action (or portions thereof) which state a claim against either Union Oil or IUPIW, the court would then be required to dismiss the removed action on the basis that plaintiff's co-employees and supervisor are indispensable parties within the meaning of FRCP 19. Such a dismissal would require the refiling of the entire action in state court and would result in duplicative efforts and costs. Therefore, it would seem proper and logical at this time to remand the entire action to state court. Accordingly,

IT IS ORDERED that defendants' petition for removal is denied.

Dated: June 9, 1983.

ROBERT M. TAKASUGI
United States District Judge

Appendix "B"

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ORANGE

Dept. 22

Court convened at ..... M. ..... Dec. 19, 1985, present Hon. JUDITH M. RYAN, Judge; T. HINSON, Deputy Clerk; NONE, Deputy Sheriff; NONE, Reporter; and the following proceedings were had:

39-90-45 BUCHANAN VS. UNION OIL CO.

The court having taken the matter under submission on 9-19-85 and having considered the entire record herein rules as follows:

Defendant's motion for summary judgment is denied. Treating defendant's motion, in the alternative, as a motion for summary adjudication as to the first and fifth causes of action, defendant's motion is granted as to the fifth cause of action on the basis of pre-emption. Defendant's motion as to the first cause of action is denied. [*Garibaldi v. Lucky Food Stores, Inc.* (1984) 726 F.2d 1367 cases cited therein.]

Insofar as defendant seeks summary adjudication of issues specifically related to the first cause of action those issues are denied on the basis of the court's ruling herein that the first cause of action is not pre-empted and as to issues #7, 8, 9 and 10 in particular, there are triable issues of material fact. [See the deposition testimony of plaintiff.] These issues as specified related the fifth cause of action are moot.

Clerk to mail notice to counsel as indicated below.

ENTERED: Dec. 19, 1985

Appendix "C"

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

UNION OIL COMPANY OF CALIFORNIA, *Petitioner,* v. SUPERIOR COURT OF CALIFORNIA, COUNTY OF ORANGE, *Respondent;* PAT J. BUCHANAN, *Real Party in Interest.*	ORDER G003657 (Super. Ct. No. 39 90 45)

THE COURT:*

The petition for a writ of mandate is DENIED.

TROTTER

TROTTER, Presiding
Justice

* Before Trotter, P.J., Wallin, J. and Sonenshine, J.

Appendix "D"

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
4th District, Division 3, No. G003657
IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

UNION OIL COMPANY OF CALIFORNIA, *Petitioner,*

v.

SUPERIOR COURT OF THE COUNTY OF ORANGE,
Respondent,

BUCHANAN, *Real Party in Interest.*

Petition for review DENIED.

_____

Chief Justice

Supreme Court, U.S.
FILED
SEP 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-2091

IN THE

Supreme Court of the United States

October Term, 1985

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

vs.

PAT J. BUCHANAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated: March 7, 1984

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No. 85-2091

In The

Supreme Court of the United States

October Term, 1985

UNION OIL COMPANY OF CALIFORNIA,
Petitioner,

vs.

PAT J. BUCHANAN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO CALIFORNIA SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Pat J. Buchanan (hereafter "Buchanan") respectfully submits the following response to the petition of Union Oil Company of California (hereafter "Union Oil") for the issuance of a writ of certiorari to review a decision of the California Supreme Court entered on March 27, 1986.

STATEMENT OF THE CASE

A. The Facts.

In its petition, Union Oil has painted an inaccurate picture of the case herein by omitting a major portion of the allegations of Buchanan's cause of action for intentional infliction of emotional distress. The main thrust of that cause of action is that Union Oil ratified, condoned and acquiesced in a campaign of harassment perpetrated upon Buchanan by her fellow workers, three of whom are named as co-defendants. While Buchanan's complaint sets forth certain acts by the supervisory personnel of Union Oil [quoted by Union Oil at page 4 of its petition], which arguably may fall under the collective bargaining agreement, the gravamen of Buchanan's complaint is set forth in the following allegations which Union Oil omitted:

> "At all times mentioned herein, and ever since approximately May 8, 1979, and continuously thereafter to on or about July 16, 1982, defendants, and each of them, with the knowledge, permission and consent of each and every other defendant, including defendant UNION OIL, and its supervising personnel, conspired to and have acted in concert and individually, to vex, harass, annoy, demean, and otherwise improperly interfere with plaintiff's contract of employment with defendant, UNION OIL, and with the performance of plaintiff's duties of employment, with the object and intent to force or cause plaintiff to suffer humiliation, mental anguish and emotional distress, and to cause plaintiff to resign her position of employ-

ment or to be fired or dismissed therefrom, as more specifically appears hereinafter."

[The paragraphs quoted by UNION OIL in its petition, at page 4, are incorporated herein by reference.]

"(b) Acts and conduct of co-employees: Constant vandalism of plaintiff's personal locker, theft of plaintiff's personal property and tools, destruction of plaintiff's personal property, ruining both pairs of plaintiff's work boots by filling them with pipe dope, false statements regarding plaintiff's activities and character, tampering with plaintiff's log entries, threats of physical violence, slandering, defaming and demeaning plaintiff at every and all opportunities, and many other acts designed to discredit plaintiff in the eyes of the employer.

"All such acts were done by defendants, and each of them, with the object and intent of harassing plaintiff and for the purpose of forcing her to leave her employment, and at all times mentioned herein, defendants, and each of them, wilfully engaged in the acts and conduct aforesaid with the express purpose of discriminating against plaintiff because of her sex.

"At all times mentioned herein, plaintiff continually and on a regular basis complained to defendant IUPIW and to defendant, UNION OIL, by and through its supervisory personnel, including defendants, JIMMIE D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, and DOES 1 through 3, inclusive, and each of them, about the aforesaid acts and conduct; said

defendants, and each of them, failed to take appropriate actions to insure that plaintiff would not continue to be subjected to such wrongful acts and conduct.

"By failing to check the aforesaid acts and conduct, despite plaintiff's repeated pleas and complaints, defendants, IUPIW, UNION OIL, JIMMIE D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, and DOES 1 through 3, inclusive, and each of them, ratified and condoned said wrongful acts and said acts are imputed to said defendants, IUPIW, UNION OIL, JIMMIE D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, and DOES 1 through 3, inclusive, and each of them.

"The aforesaid acts of defendants, and each of them, are and amount to outrageous conduct.

"Plaintiff, as a woman, and particularly as the only woman employed on Platform Eva, was particularly susceptible to emotional distress as a result of the outrageous acts and conduct of defendants, and each of them.

"As a direct result of the campaign of harassment perpetrated by defendants, and each of them, plaintiff became fearful for her personal safety, and suffered such nervous, mental and emotional distress that she was required to seek medical attention and on March 17, 1982, was required to go on medical disability leave. On or about July 16, 1982, and while plaintiff was on medical disability leave, plaintiff was terminated from her employment by defendant, UNION OIL."

Union Oil has conveniently quoted only a minor part of Buchanan's cause of action so as to give the impression that all of the facts underlying Buchanan's claim for intentional infliction of emotional distress relate to acts grievable under the collective bargaining agreement. On the contrary, the main thrust of Buchanan's cause of action concerns intentional and tortious acts of her co-workers, which conduct is outside the scope of the collective bargaining agreement, and which conduct Buchanan alleges the supervisory personnel at Union Oil condoned and ratified. Buchanan's tort allegations are not founded on a breach of the collective bargaining agreement and are not "inextricably intertwined" with rights and obligations established by the contract.

B. Proceedings Below.

On March 23, 1984, the superior court entered a stipulation, jointly filed and agreed to by Union Oil and Buchanan, to voluntarily dismiss from the Complaint, with prejudice, the supervisory employees of Union Oil named as co-defendants. Union Oil, by omitting a portion of that stipulation, gives an inaccurate picture of the proceedings below.

In dismissing the supervisory employees, Union Oil stipulated that the supervisors were acting as agents on behalf of Union Oil and that their acts and conduct were imputable to Union Oil. *Appendix "1"*.

OPPOSITION TO GRANTING THE WRIT

A. BUCHANAN'S TORT ACTION DOES NOT REQUIRE INTERPRETATION OR ADJUDICATION OF THE COLLECTIVE BARGAINING AGREEMENT AND THEREFORE IS NOT PREEMPTED.

Contrary to Union Oil's assertion, the application and interpretation of the collective bargaining agreement are not at the core of Buchanan's claim for intentional infliction of emotional distress.

Buchanan's claim for intentional infliction of emotional distress arises out of a campaign of harassment by her co-workers, tortious conduct outside the scope of the collective bargaining agreement. Although Buchanan does complain of several specific acts of supervisors [which Union Oil asserts are Buchanan's sole allegations], her main complaint against Union Oil is that she repeatedly brought to the attention of supervisory personnel the harassment she was experiencing and that Union Oil, by its inaction, ratified and condoned the objectionable conduct of her co-workers.

Union Oil seeks to capitalize on Buchanan's termination, which she did not grieve, [and which has been found to be pre-empted], as the source of her emotional distress. On the contrary, Buchanan's emotional distress arose from a course of conduct for a period of a year or more prior to her termination and would have been actionable even if Buchanan had not been discharged. Buchanan's involuntarily termination came while she was on disability leave for treatment of her emotional distress.

Union Oil's reliance on *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425 (9th Cir. 1983), as the

appropriate test to detemine preemption, appears to be misplaced. *Beers* involved a case coming under the Railway Labor Act which provides that the provisions of the Act are the exclusive remedy for workers covered by that Act, thus excluding any state claims. Buchanan's employment was not covered by the Railway Labor Act and therefore the *Beers* analysis s is inappropriate in this instance.

Union Oil additionally relies heavily on the more recent case of *Allis-Chalmers Corp. v. Lueck*, 471 U.S. __, L.Ed.2d 206, 105 S.Ct. 1904 (1985), which provided that when resolution of a state-law claim is *substantially* dependent upon analysis of the terms of a collective bargaining agreement, that claim must either be treated as a section 301 claim or dismissed as preempted by federal labor-contract law. (Emphasis added.) Clearly, Buchanan's complaint of emotional distress arising out of a campaign of harassment by her fellow employees is not founded on a breach of the collective bargaining agreement and is not "inextricably and intertwined" with rights and obligations established by the contract, and is not grievable thereunder. (*Allis-Chalmers Corp. v. Lueck, supra.*)

B. BUCHANAN'S CAUSE OF ACTION IS NOT PREEMPTED UNDER EITHER THE *GARMON-FARMER* BALANCING TEST OR THE *LUECK* UNIFORMITY TEST.

Courts have traditionally followed the preemption analysis first described in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, and further developed in the area of labor law in *Farmer v. United Brotherhood of Carpenters and Joiners of America*, 430 U.S. 290, 97 S.Ct. 1056 (1977). This test is based on a

balancing (weighing) of competing Federal and State interests, if any, in governing the conduct involved in the case. If the State claim involves matters of merely peripheral concern to the Federal Act or involves matters "sufficiently deeply rooted in local feeling," the State claim is not preempted.

In *Farmer, supra*, this Court was presented with the same preemption issue under a California action for intentional infliction of emotional distress. Applying the *Garmon* test, the Court held that the California state action for intentional infliction of emotional distress was not preempted by Federal Labor Law. The Court held that said action was deeply rooted in local feeling and concluded the State's interest in protecting the health and well-being of its citizens outweighed any peripheral concern to the Federal Act.

The second test recently described in *Allis-Chalmers v. Lueck, supra*, looks to the need for uniformity which underlies the doctrine itself. Under this test, if the state action is inextricably intertwined with consideration of the terms of the labor contract to define the meaning of the contract relationship, then the state claim is preempted. The Court applied this test to preempt a state law tort action for bad faith in the handling of a disability insurance claim filed by a union employee under an employer-provided health plan governed by the collective bargaining agreement.

In holding that the state action was preempted, the Court emphasized the need for uniformity in interpretation of disability insurance policies that derived from a collective bargaining agreement. However, the Court noted that its holding was one of "narrow focus," and reiterated the long-standing rule that not every state law claim asserting a right that relates in some way to a provision in a collective

bargaining agreement, or more generally to the parties to such an agreement, necessarily is preempted under the Labor Management Relations Act.

The very argument advanced by Petitioner here was rejected by the California Appellate Court for the First District in *Alpha Beta, Inc. v. Superior Court* (1986) 180 Cal.App.3d 324, [Petition for review pending]. At footnote one, the Court summarized the *Lueck* decision of this Court, and applying the test to the claim, stated:

> ". . . Nahm's claim for emotional distress is not preempted under the narrow holding in *Lueck*. Her claim does not implicate the terms of her collective bargaining agreement. Whether or not her supervisors mistreated her involves no interpretation of contract terms. Hers is not a case of substituting state tort actions for discipline or grievance procedures in which conduct of an employer or an employee is alleged in violation of the agreement . . . . Rather, Nahm's claim is a straightforward state tort action for tort recovery for emotional distress caused by intentional, outrageous conduct. Recovery is based on Nahm's right, independent of contract to be free from conduct so reprehensible that no reasonable [person] in a civilized society should be expected to endure it." (180 Cal.App.3d 324.)

Thus, under either test, Buchanan's cause of action for intentional infliction of emotional distress is not preempted.

C. THE SUPERIOR COURT DID NOT ERR IN APPLYING THE HOLDING IN *GARIBALDI V. LUCKY FOOD STORES, INC.*

In denying Union Oil's motion for summary judgment on Buchanan's cause of action for intentional infliction of emotional distress, the superior court, in its order, refers not only to *Garibaldi v. Lucky Food Stores, Inc.* (1984) 726 F.2d 1367, but to the cases cited therein.

1. Petitioner's First Claim is that the Only Issue in *Garibaldi* was Removal.

In *Garibaldi,* the District Court found it had jurisdiction over the cause of action for wrongful discharge and granted removal. The Court also retained jurisdiction of the emotional distress claim presumably under the doctrine of pendent jurisdiction. Thereafter, the District Court dismissed the wrongful discharge claim on the basis of the statute of limitations and remanded the emotional distress claim to state court.

Although *Garibaldi* is a case presenting the issues of removal and remand, the Ninth Circuit held that the case turned on whether plaintiff's claims were preempted and gave the state court some guidance on this issue. Thus, *Garibaldi* discusses preemption, including the question of preemption of a state tort claim for intentional infliction of emotional distress [set forth at 726 F.2d 1367, footnote four at page 1369 and at page 1373] and cites the *Farmer* test.

2. Petitioner Misconstrues the District Court's Order Denying Removal.

Union Oil seeks to raise Judge Takasugi's Order Denying Petition for Removal of this case as a finding of preemption on Buchanan's cause of action for intentional infliction of emotional distress. The District Court was concerned only with the issues of jurisdiction and removal and made no finding that BUCHANAN'S claim was preempted.

3. Buchanan's Claims for Wrongful Termination and Intentional Infliction of Emotional Distress are Separate and Distinct Causes of Action.

Additionally, contrary to Union Oil's assertion, it does not follow that because the superior court found Buchanan's action for wrongful discharge to be preempted that Buchanan's claim for intentional infliction of emotional distress should be found to be preempted. Buchanan's emotional distress was not the result of her wrongful termination.

D. EXHAUSTION OF CONTRACTUAL REMEDIES WAS NOT REQUIRED BY BUCHANAN.

Buchanan's claims for mental distress are not covered by the language of the Agreement and therefore are not subject to the grievance procedure set forth therein. Notwithstanding the fact that the party claiming preemption has the burden of proof, Union Oil has never cited any particular section of the collective bargaining agreement which covers intentional torts by co-workers. Buchanan's

right to be free from hostility, harassment, and the infliction of emotional distress in the workplace is independent of the collective bargaining agreement, is of paramount concern to the state and is peripheral to the concerns of the Labor-Management Relations Act. (*Vaca v. Sipes* 386 U.S. 171 (1967), footnote No. 8.)

Therefore, the state court has jurisdiction to hear plaintiff's cause of action for intentional infliction of emotional distress, and it should not be dismissed on the grounds of preemption.

E. CALIFORNIA HAS NOT ESTABLISHED CONFLICTING RULES WHICH UNDERCUT NATIONAL LABOR POLICY.

Contrary to Union Oil's assertions, California has not established conflicting rules which impair national labor policy.

Union Oil cites *Friday v. Hughes Aircraft Company* (1986) 179 Cal.App.3d 947, as a case in which the same California Appellate Court that denied preemption in Buchanan's case, found in favor of preemption. Petitioner contends Friday is a case identical in facts and issues to Buchanan's case. That statement, however, is inaccurate. In *Friday*, the California Appellate Court for the Fourth District found that Friday's claims for intentional infliction of emotional distress were preempted because they were based on the physical conditions of his workplace, a matter covered in the collective bargaining agreement and would necessarily involve interpretation of the relevant sections of the agreement to determine the parties' right under it. (179 Cal.App.3d 947.)

The main thrust of Buchanan's claim, on the otherhand, is for intentional and tortious conduct perpetrated by her co-workers and is outside the scope of the collective bargaining agreement. Furthermore, unlike Friday, Buchanan's emotional distress did not arise out of the wrongful termination.

Alpha Beta, supra, additionally is distinguishable from *Friday,* and does not present a conflicting ruling. In *Alpha Beta,* the California Appellate Court for the First District found that Nahm's claims for intentional infliction of emotional distress were not preempted as they were not related to her termination, that her claims did not implicate the terms of the collective bargaining agreement and did not threaten uniformity of law governing labor contract interpretation. As in Buchanan's case, Nahm's emotional distress arose out of a campaign of harassment which accrued during her employment.

As is evident, the California courts have taken into account the individual facts of each case in making their rulings and have not established conflicting rules which threaten to impair federal labor policy.

CONCLUSION

For the foregoing reasons, Respondent, Pat J. Buchanan, respectfully requests the Court deny Union Oil's Petition for Writ of Certiorari herein.

DATED: September 12, 1986.

Respectfully submitted,

PATRICIA HERZOG
Counsel of Record
[Admission Pending]
Attorney for Respondent
PAT J. BUCHANAN

APPENDIX "1"

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ORANGE

PAT J. BUCHANAN, CASE NO. 39 90 45
Plaintiff, STIPULATION

vs.

UNION OIL COMPANY OF CALIFORNIA, a California corporation; INTERNATIONAL UNION OF PETROLEUM AND INDUSTRIAL WORKERS (SIUNA AFL-CIO)), a California corporation; JIMME D. GRIMES, ROBERT E. HARKE, ROBERT L. GRAVES, LAWRENCE F. BADER, GARY M. MELSOPP, ROBERT B. TAYLOR, and DOES 1 through 20, inclusive,
Defendants.

The following Stipulation is entered into on the dates below indicated to be effective February 24, 1984 by Plaintiff, Pat Buchanan, and Defendant, Union Oil Company of California, through their respective attorneys:

1. Plaintiff shall voluntarily dismiss, with prejudice, the following supervisory employees of Defendant Union Oil

Company of California named in the above-entitled action: Jimmy D. Grimes, Robert E. Harke, Robert L. Graves.

2. Defendant agrees that at all times alleged in Plaintiff's First Amended Complaint, Defendants Jimmy D. Grimes, Robert E. Harke and Robert L. Graves were acting as agents on behalf of the Defendant corporation, Union Oil Company of California, and that their acts and conduct arose out of and in the course and scope of their employment with the Defendant, and that their acts, or conduct, is imputable to the Defendant corporation.

3. The parties mutually agree to cooperate with one another with respect to the oral depositions of Jimmy D. Grimes, Robert E. Harke and Robert L. Graves as provided under the provisions of California Code of Civil Procedure Section 2019.

AGREED:

DATED: March 7, 1984.

By: s/s PATRICIA HERZOG
Attorney for Plaintiff
PAT BUCHANAN

AGREED:

DATED: March 7, 1984.

By: s/s HARVEY H. KLEE
Attorney for Defendant
UNION OIL COMPANY OF CALIFORNIA

MAR 23 1984
IT IS SO ORDERED:

s/s WILLIAM SHEFFIELD
Judge of the Superior Court